

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

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)
VARIETY STORES, INC.,)
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Plaintiff,)
)
vs.) CASE NO. 5:14-CV-217-BO
)
)
WALMART, INC.,)
)
Defendant.)

WEDNESDAY, OCTOBER 24, 2018
JURY TRIAL/DAY 3
BEFORE THE HONORABLE TERRENCE W. BOYLE
UNITED STATES CHIEF JUDGE

MICHELLE A. MCGIRR, RPR, CRR, CRC
Official Court Reporter
United States District Court
Raleigh, North Carolina
Stenotype with computer-aided transcription

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I N D E X

WITNESS:

Karen Dineen (via deposition)
[As read into the record by Attorney Trimmer]

EXAMINATION:

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WITNESS:

Timothy Blackburn II

EXAMINATION:

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PLAINTIFF'S EXHIBITS:

<u>No.</u>	<u>ID</u>	<u>In Evid.</u>
PX-21 and PX-23		10
Motions, page 26		
Closing Argument by Mr. Adams, page 37		
Closing Argument by Mr. Puzella, page 46		
Rebuttal Closing Argument by Mr. Adams, page 60		
Jury Charge, page 68		
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* * *

1 (Wednesday, October 24, 2018 commencing at 9:32 a.m.)

2 **P R O C E E D I N G S**

3
4 (Jury in at 9:32 a.m.)

5 (Open Court)

6 THE COURT: Good morning.

7 Call your next witness. Are you ready with your
8 next witness?

9 MR. ADAMS: Yes, we are, your Honor. We have two
10 short rebuttal witnesses and we'll be finished.

11 THE COURT: All right.

12 MR. ADAMS: First of all, I'd like to call Ms.
13 Trimmer back to the stand. We have about two pages of
14 additional deposition testimony of Ms. Dineen.

15 THE COURT: All right.

16 MR. ADAMS: This is starting at page 31 of her 2014
17 deposition at line 21.

18 **KAREN DINEEN**

19 having been duly sworn, testified as follows via deposition
20 testimony [as read into the record by Attorney Trimmer]:

21 **DIRECT EXAMINATION**

22 BY MR. ADAMS:

23 Q. And in 2011, so far as you know, was Walmart aware
24 that it had used the name, including Backyard, on grills?

25 A. To the best of my knowledge the team was made aware

1 that Variety had registered the mark The Backyard only, so to
2 the best of my knowledge I think that's all we were made
3 aware of.

4 Q. Isn't it customary for Walmart to go into
5 competitors' stores and do comparison shopping and just to do
6 intelligence on what competitors are selling?

7 A. Yes.

8 Q. Wouldn't it have been likely that when this
9 trademark registration showed up somebody from Walmart would
10 have gone to a Variety store somewhere just to see how they
11 were using their mark?

12 A. No.

13 Q. You don't think that's likely?

14 A. No.

15 Q. Does Walmart ever do that?

16 A. Could you define what "that" is?

17 Q. Yeah, do intelligence shopping in competitors'
18 stores.

19 A. Yes.

20 Q. Any particular reason why you think that not -- let
21 me start over. Any particular reason why you think that
22 might not have been done in this case?

23 A. Yes.

24 Q. And why is that?

25 A. We look at from our brand team perspective as some

1 key major competitors that we would identify. Target, Home
2 Depot, Lowe's. And there may be some others that I'm not
3 recalling.

4 Q. So Variety's business doesn't fall within Walmart's
5 principal target area, is that what you're saying?

6 A. No. It's possible on a local level that there are
7 Walmart associates from our stores that would shop the stores
8 in those local areas, but overall for our competitive
9 benchmarking on this project, we did not include Variety
10 Stores.

11 MR. ADAMS: That's all, your Honor, for this
12 witness.

13 THE COURT: Okay.

14 And again, ladies and gentlemen, that is the
15 testimony of a witness who was examined under oath at a
16 different time before this trial and they can use it here in
17 the trial.

18 MR. ADAMS: Now, your Honor, plaintiff calls as a
19 rebuttal witness Mr. Tim Blackburn.

20 THE COURT: Okay.

21 (Timothy Blackburn, having been previously sworn, resumed the
22 witness stand)

23 THE COURT: You're still under oath from the
24 previous testimony.

25 THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. ADAMS:

Q. Good morning, Mr. Blackburn.

A. Good morning.

Q. Mr. Blackburn, I've placed a chart on the easel and I have marked it as Plaintiff's Exhibit 23. Were you in the courtroom on Monday when Walmart's counsel referred to this chart which was projected onto the screen in his opening statement?

A. Yes, sir.

Q. And what do you recall Mr. Puzella saying about this chart?

MR. PUZELLA: Objection, your Honor. This is not rebuttal testimony. As counsel just said, this was in my opening. He could have addressed these on direct and he did not.

THE COURT: Overruled.

A. It said that these were illustrations of the fact that the Backyard mark is widely used in the marketplace.

Q. (By Mr. Adams) Were you surprised to hear this?

A. Yes.

Q. Why?

A. Well, our buyers are in the marketplace all the time. They're professionally in the marketplace. And they had no problem finding Fred's use of Backyard when they used

1 it and they had no problem finding Harris Teeter's use when
2 they used it. They had no problem finding Walmart's use when
3 they used Backyard. But I haven't had a single buyer come to
4 me and say, Tim, did you know that there are all these other
5 uses of Backyard in the marketplace that we're using on our
6 merchandise.

7 Q. So what, if anything, did you do after seeing this
8 chart and hearing Mr. Puzella's comments about it?

9 A. Well, I thought I would get chapter and verse on
10 it, so I did some research and looked each one of those up.

11 Q. And how did you go about doing that?

12 A. Well, previously I described it's easy to go on the
13 United States Patent and Trademark Office website and look
14 them up and the chart gives you the actual registration
15 number. You can just type that number in and it pulls it
16 right up.

17 Q. Did you have any assistance in doing this?

18 A. Yes. Mr. Long assisted me in doing it, though
19 actually when using that website, I could have done it on my
20 own.

21 Q. So this research was done by you with Mr. Long's
22 assistance?

23 A. Yeah. We were just sitting side by side and we
24 would pull it up and look at the mark. Then if we needed to
25 look up the company itself, we would go to their website and

1 look at their website.

2 Q. All right. Just tell the jury a little bit more
3 specifically exactly what you did.

4 A. We went into the Trademark Office website, typed in
5 the registration number. When the page came up for the
6 registration, we would read what it was, look at any
7 specimens we were interested in and then look for any further
8 information we might need.

9 Q. All right. What did you learn from your research?

10 A. Well, the shocking thing was that after number 14
11 on that chart, every one of those marks is dead. And --

12 Q. What do you mean by dead?

13 A. They're no longer active. It means that the mark
14 was of so little use to the company that had it that they
15 didn't even trouble to file a renewal when the renewal date
16 came around.

17 Q. And was there another category of trademark
18 registrations that you found during your research?

19 A. The first 14 are still active trademarks. And so
20 we did further research on those to see, is this some
21 evidence that Backyard is widely used in the marketplace.

22 Q. All right. Mr. Blackburn, as a result of the
23 research you did regarding the marks on Plaintiff's
24 Exhibit 23, have you prepared a revised exhibit that
25 illustrates your findings?

1 A. I have.

2 Q. And is that shown in Plaintiff's Exhibit 21?

3 A. It is.

4 MR. ADAMS: Your Honor, I move Exhibits 21 and 23
5 into evidence.

6 THE COURT: Let them be received.

7 MR. ADAMS: PX. I'm sorry, I never get that right.

8 THE COURT: That's all right. It will be received.

9 **(Plaintiff's Exhibit Nos. PX-21 and PX-23 received into**
10 **evidence)**

11 Q. (By Mr. Adams) What does this chart show, Mr.
12 Blackburn?

13 A. Well, it shows the 25 -- that's like two-thirds.
14 There are 39 on the screen. It shows that 25 of them are
15 dead and then it shows the first 14, which are still active,
16 are unrelated and no indication of any widespread use in the
17 marketplace.

18 Q. Did you find it unusual that these trademark
19 registrations were exactly organized into two separate
20 groups, ones that are dead and ones that are unrelated?

21 A. Well, obviously the best foot forward is put there
22 and then the dead ones are put at the back.

23 Q. All right. Well, give us two or three examples of
24 goods or services for the registrations that you found to be
25 unrelated. Just a handful.

1 A. Well, if you look down there and find the ones --
2 like number six down, I think it's Backyard Organizer.
3 They're out of New Brunswick, Canada, and they make wooden
4 utility buildings and sell those. You can't really tell from
5 looking on the information whether they've got one store or
6 two stores or any stores that they're selling them to, but
7 their lead products are utility buildings, wooden utility
8 buildings.

9 You go down a few more and you see some really odd
10 names that stick out. Like right down towards the bottom,
11 Discover a Refuge in Your Own Backyard, and then the one
12 under it is the Backyard Naturalizer or something like that.

13 Q. It's Naturalist.

14 A. The Backyard Naturalist. Well, those two are about
15 wild birds and feeding wild birds. And I think they have one
16 or two stores, and one of them really is about selling books
17 so you can look up about wild birds. And they sell bird seed
18 and they apparently sell some grills now and then, but
19 they're not exactly flooding the marketplace with grills and
20 grills accessories.

21 Then there's another one up there, The Backyard
22 Place. There it is. The Backyard Place. Well, they sell
23 swimming pools and stuff like that, you know. And here
24 again, you can't tell that they've got as many as two stores
25 much less 20 or 30 or 50. And the idea that they're flooding

1 the marketplace with Backyard goods is preposterous, and yet
2 these are the ones that Walmart put on the screen. These are
3 the ones that they put in front of you. And two-thirds of
4 them are dead and the others are obscure little uses of
5 Backyard, and that's the best that they can do to tell you
6 that Backyard is all over the marketplace, which I knew when
7 I started out that was what I was going to find because our
8 buyers would have known it if they were -- if it was widely
9 used in the marketplace.

10 Q. Now, Mr. Blackburn, in your view do any of these
11 entries on this chart demonstrate that the word "Backyard"
12 is, quote, widely used as is printed on the top of this
13 exhibit?

14 A. They show the exact opposite. If this is the best
15 Walmart can do, they have proved that it's not widely used in
16 the marketplace.

17 Q. All right. Mr. Blackburn, you were here yesterday
18 to hear Ms. Dineen testify that the reason Walmart switched
19 from Backyard Barbecue to Backyard Grill was because of
20 either a trademark registration application or an unnamed
21 third-party user of Backyard Barbecue and Grills. Do you
22 recall that?

23 A. I recall that.

24 Q. What did you think when you heard that testimony?

25 A. Well, that was a surprise. A, that use is not up

1 here on this screen.

2 Q. Did you expect it to have been up there if --

3 A. It would be -- if that's the exact reason why they
4 didn't use Backyard Barbecue and had to switch to Backyard
5 Grill, their second choice on that, then surely that's a big
6 deal.

7 Q. So in this instance did you do anything to see if
8 you could find out who that third-party user was?

9 A. Yes. And this was more complicated to search.

10 Q. All right. So what did you do?

11 A. Went back to the hotel and Ms. Trimmer and I sat
12 down and we used a program that trademark attorneys use. You
13 have to have -- you have to subscribe to this program. It's
14 called Core Search. And it enables you to search not just
15 the U.S. Patent Office, but every registration bureau in
16 every -- all the 50 states. It will run a search in all of
17 those.

18 Q. All right. So you were using -- you were basically
19 searching this Core Search database to see if you could find
20 the reference to Backyard Barbecue that Ms. Dineen referenced
21 in her testimony; is that correct?

22 A. Correct.

23 Q. So what information does this Core Search database
24 include?

25 A. As I said, it would include the federal trademark

1 registrations, whether they're alive or dead. It includes
2 the registrations in all the 50 states.

3 Q. Were you able to find federal trademark
4 registrations or applications for Backyard Barbecue?

5 A. I think we found one which was for potato chips,
6 and that was the only thing that we found that was really
7 Backyard Barbecue.

8 Q. All right. Now, Mr. Blackburn, there are a number
9 of ways that you can write barbecue. You can write it BBQ or
10 bar-B-Q or just whatever. What did you do to make sure you
11 got as many of the alternatives as possible?

12 A. Well, we did two things. The program has a little
13 box you can check that will run the search phonetically.
14 That means anything that sounds like it will pull up, too.
15 But we also used every variation we could think of. We
16 spelled Barbecue out, we spelled it BBQ, we spelled Barbecue
17 C-U-E, we spelled it Q-U-E. Everything we could think of.

18 Q. So were you able to find any Backyard Barbecue
19 registrations or applications in the trademark offices in the
20 50 states?

21 A. No.

22 Q. Were you able to find any non-registered users of
23 Backyard Barbecue relating to grills and grill accessories?

24 A. Could you repeat that?

25 Q. Yes. Were you able to find any non-registered uses

1 of Backyard Barbecue relating to grills and grill
2 accessories?

3 A. Well, we ran a search on Google. And here again,
4 we tried every variation we could think of and we tried
5 specifying that we were looking for grills and we couldn't --
6 again, we couldn't find this Backyard BBQ or Backyard
7 Barbecue for grills and grill accessories that would have
8 been a use that was at that time -- and that was also
9 something about the search that we ran earlier. There have
10 been some uses that are somewhat similar but they're like
11 2016. They don't have dates that would match up to what Ms.
12 Dineen was testifying to.

13 Q. Her deposition was taken in 2014, correct?

14 A. Correct. And she's saying -- she was testifying
15 that what scared them off of using Backyard Barbecue in 2011
16 was that they knew of some use of it or some registration of
17 it in 2011.

18 Q. Yes. Exactly. Now, Mr. Blackburn, what
19 conclusion, if any, do you draw from the results of your
20 search that you and Ms. Trimmer did last night?

21 A. That if there was any use at that time of Backyard
22 BBQ, Backyard Barbecue on grills and grills accessories, in
23 the marketplace at that time, it was us or it can't be found.

24 MR. ADAMS: No more questions, your Honor.

25 THE COURT: All right. Any cross?

1 MR. PUZELLA: Yes, sir. May I approach?

2 THE COURT: Yes.

3 **CROSS-EXAMINATION**

4 BY MR. PUZELLA:

5 Q. I'd like to use both of these. So I'll just hold
6 this like this for a moment.

7 Mr. Blackburn, you testified a moment ago with the
8 red Xs on the version of my demonstrative that Backyard Chef
9 was unrelated, correct?

10 A. Yes.

11 Q. Is there a Backyard Chef on Mr. Puglisi's
12 demonstrative?

13 A. I can't see from here.

14 Q. Okay.

15 A. But if there is, just point it out.

16 THE COURT: You can go down there if you want.

17 Q. (By Mr. Puzella) Right here? Do you see that?

18 A. Yes.

19 Q. Does it say the words, Backyard Chef?

20 A. It does.

21 Q. Is that a grill?

22 A. It's a very high-end grill --

23 Q. Is that a grill, sir?

24 A. It is a grill and it's --

25 Q. That is a --

1 MR. ADAMS: He should be allowed to finish his
2 answer --

3 MR. PUZELLA: I asked if it was a grill and the
4 answer is yes.

5 A. It's a high-end store and as far as I could tell,
6 it's one store.

7 MR. PUZELLA: Your Honor --

8 Q. (By Mr. Puzella) Did you go through Mr. Puglisi's
9 examples during your direct, your redirect just now? No.

10 A. No, I didn't.

11 Q. You only went through the registrations that were
12 on my demonstrative in the opening, correct?

13 A. Those were the ones I searched because those are
14 the ones you put forward as being the best evidence.

15 Q. Did you just describe all of the research that you
16 did last night?

17 A. Fairly much. I didn't do all of that just last
18 night.

19 Q. So you did it previously?

20 A. I did it the night before and last night.

21 Q. Okay. Since you testified, have you described for
22 the jury just now all of the research that you did concerning
23 the registrations in the exhibit?

24 A. That I personally did?

25 Q. Yes. That you were competent to testify about,

1 have you described all of the research that you have done?

2 A. I've described the ones I did here.

3 Q. Okay. So you --

4 A. I've done other research before. There are other
5 lists, the lists that you provided us, and I've looked at
6 other ones.

7 Q. Sir, all I'm asking is since you testified in this
8 trial, you did some research. You just testified to that,
9 correct?

10 A. Correct.

11 Q. Have you described for the jury all of the research
12 that you've done since you testified?

13 A. I think so. Pretty much.

14 Q. Didn't leave anything out?

15 A. I don't think so.

16 Q. Okay. So you didn't look at all those
17 registrations and determine which among them were live in
18 2010, were live in 2011, were live in 2012, were live in
19 2013?

20 A. Yes. In fact, I did.

21 Q. You did. But a moment ago you just testified that
22 you didn't tell the jury about that.

23 A. Your question was did I -- have I described what
24 kind of research I did. I didn't tell you everything I
25 found. Four of those --

1 Q. Which ones of them are live?

2 A. -- four of those were dead in 2012. Four of those
3 were dead in 2013. When you put that -- when you made that
4 chart, you knew they were dead and had been dead since that
5 time.

6 Q. Since --

7 A. And you put those in front of the jury to tell this
8 jury and tell this Court that they were evidence of the wide
9 use of Backyard in the marketplace.

10 Q. Sir, four were dead in 2012 and more were dead in
11 2013. That's what you just testified to, correct?

12 A. Yes.

13 Q. Walmart adopted the mark Backyard Grill in 2011.

14 A. I understand that. You put this up there to say --

15 Q. Sir --

16 A. -- what was widespread in the marketplace.

17 Q. Please don't argue with me. Answer the question I
18 pose. Your counsel can ask you questions when I'm done.

19 Walmart adopted the Backyard Grill mark in 2011,
20 correct?

21 A. That's correct.

22 Q. And you just testified that four of those marks
23 were dead in 2012, correct?

24 A. Correct.

25 Q. And several more were dead in 2013, correct?

1 A. Correct.

2 Q. 2012 and 2013 is after 2011, correct?

3 A. That's correct.

4 Q. So the marks you just described as dead were, in
5 fact, not dead at the time that Walmart adopted the Backyard
6 Grill mark, correct?

7 A. Correct, but --

8 Q. Thank you. You can answer more of those questions
9 when your counsel does your recross, okay?

10 Do you recall during my examination of you that we
11 went through Defendant's Exhibit 191, which was Variety's
12 answers to Walmart's requests for admissions?

13 A. Yes.

14 Q. And do you recall that there were 40 or so
15 registrations that we discussed where the word "Backyard" was
16 used in various classes of goods?

17 A. It's those same ones right there.

18 Q. And you'll recall that Variety admitted that those
19 registrations existed?

20 A. Yes.

21 Q. And you'll recall that Variety admitted that they
22 never opposed those registrations?

23 A. Correct.

24 Q. So even when the marks were live, Variety never
25 opposed those registrations, correct?

1 A. Because they weren't similar uses, they were
2 unrelated uses. They were in obscure places and one store
3 here and there and that's why we didn't. They were not
4 confusingly similar to our customers.

5 Q. You also testified about your efforts last night
6 using the Core Search tool to identify uses of Backyard BBQ
7 and Barbecue, correct?

8 A. Correct.

9 Q. Have you used the Core Search tool previously?

10 A. No.

11 Q. So you had never used it before last night?

12 A. Never.

13 Q. Okay. So you had counsel help you with that?

14 A. Yes. She sat right beside me in a chair and I sat
15 there and we'd look at them. She's faster than me, so she
16 would jerk here and there and I'd have to stop her so I could
17 stop and read each one of them.

18 Q. The Core Search tool that you testified about, to
19 your knowledge does it include uses that are not registered?

20 A. If it did, we weren't using that part of the
21 mechanism.

22 Q. So you were searching last night only registered
23 trademarks either on the federal system or within 50 states,
24 correct?

25 A. No. Then after we did that, we went on Google and

1 tried to see what we could come up with for any unregistered
2 uses.

3 Q. And you didn't find any, you testified.

4 A. No.

5 Q. Did you do anything to look back in time to see
6 what was available in 2011 perhaps?

7 A. There actually is a search you can do on that. You
8 would find one that's live now that you thought you needed to
9 look back to see the date of use, but that wasn't necessary.
10 Once we -- on the ones we were looking at, we couldn't find
11 anything that was close enough to make us need to go do that.

12 Q. So your testimony is that in your research, you
13 didn't find a single use of Backyard BBQ over the course of
14 the research that you performed?

15 A. Correct.

16 Q. Did you --

17 A. Well, other than those potato chips.

18 Q. Did you go through the documents that Walmart
19 produced in this litigation several years ago during your
20 research for your presentation to the jury?

21 A. Not last night, no.

22 Q. No. You didn't go through the thousands of pages
23 that Walmart produced of third-party uses?

24 A. No. I didn't actually have the time to do that,
25 Mr. Puzella.

1 Q. Because there were so many uses, right?

2 A. Like this, I assume.

3 MR. PUZELLA: May I approach, your Honor?

4 THE COURT: Yes.

5 (Attorney Puzella providing documents to the witness)

6 Q. (By Mr. Puzella) I just handed you what's Exhibit
7 Defendant's 199. It has not been admitted, but it's marked
8 Defendant's Exhibit 199 and previously exchanged. It's pages
9 766 and 767. Could you read for the jury the words at the
10 top in blue?

11 A. "BackyardBBQstore.com," all together.

12 Q. And can you read about four or five down, record
13 history?

14 A. "Record created on 2003-01-14," and then it's got
15 some other numbers.

16 Q. So record created on 2003?

17 A. Correct.

18 Q. Can you read what's below that, record last updated
19 on?

20 A. 2014-05-05.

21 Q. This is a record between, at a minimum, 2003 and
22 2014, correct?

23 A. Correct.

24 Q. And 2011 is between those two dates?

25 A. Correct.

1 Q. And if you look down at the bottom, the very
2 bottom, do you see the Civil Action No. 14-CV-00217 --

3 A. Yes.

4 Q. That's this case, right?

5 A. I'll take your word for it.

6 Q. Okay. See what's next to that, Document 79?

7 A. Correct.

8 Q. Is that a docket entry number?

9 A. I guess so, yes.

10 Q. This is a document that was submitted in the course
11 of this litigation. What's to the right of that, filed when?

12 A. Filed May 28, 2015.

13 Q. This is 2018, correct?

14 A. Correct.

15 Q. So Variety has had this document for how many
16 years?

17 A. Three years.

18 Q. Okay. And you were doing research last night to
19 try and demonstrate the fact that Variety had no evidence of
20 Backyard BBQ being used in the marketplace in 2011, correct?

21 A. We were looking for use on a Backyard -- on a grill
22 or grill accessories.

23 Q. Well, turn to the next page, please, sir. It's
24 Exhibit D-199, page 767. Does this appear to be a printout
25 of the website Backyardbarbecue --

1 A. Yes.

2 Q. -- store.com?

3 A. Yes.

4 Q. What is shown in the image in the middle between
5 the charcoal and the stake, is that Backyard BBQ with a
6 picture of a kettle grill?

7 A. Yes.

8 Q. If you scroll down to the first paragraph, "Welcome
9 to the Backyard BBQ Store"?

10 A. Yes.

11 Q. Could you read that first sentence.

12 A. "We are a retail store that specializes in BBQs,
13 both gas and charcoal, plus smokers, patio furniture, outdoor
14 kitchens, gas logs and fireplace accessories. We have a
15 great selection of BBQ accessories, sauces and rubs, plus all
16 kinds of woods for smoking. We carry the following lines:
17 Big Green Egg, Weber, DCS, MHP, Kalamazoo Outdoor Gourmet,
18 Firemagic, Ace of Hearts, makers of The Good One, and
19 Cookshack. In gas logs we carry R.H. Peterson."

20 Was that what you wanted me to read?

21 Q. Yes, sir.

22 MR. PUZELLA: No further questions, your Honor.

23 THE COURT: Do you have any?

24 MR. ADAMS: No, your Honor.

25 THE COURT: Thank you. You can be excused.

1 (Witness Excused)

2 THE COURT: Any other witnesses?

3 MR. ADAMS: We have no further rebuttal, your
4 Honor.

5 THE COURT: Do you rest?

6 MR. ADAMS: Yes.

7 THE COURT: Let me send the jury out.

8 You've heard all the testimony and evidence in
9 the --

10 MR. PUZELLA: I just want to renew our JMOL
11 motions.

12 THE COURT: Wait a minute.

13 You've heard all the testimony in the case and the
14 evidence. I have to meet with the lawyers now, but when we
15 come back with the jury, you'll hear the closing arguments.
16 The plaintiff will go first because the plaintiff has the
17 burden of proof, and then the defense may make its closing
18 argument and then the plaintiff has rebuttal. When all
19 that's finished, I'll give you some instructions on the law
20 and then we'll send you to your jury room to reach a verdict.
21 That's where we are. Okay.

22 This will be a fairly long break.

23 (Jury out at 10:05 a.m.)

24 THE COURT: You can make your Rule 50 motion at the
25 end of this.

1 MR. PUZELLA: I wanted to renew our Rule 50(a)
2 motion that was filed and offered orally as well.

3 THE COURT: That will be denied.

4 We're going to have the equivalent of a charge
5 conference now, but one of the goals or requirements will be
6 to arrive at a verdict form, and I have my input into that
7 and I'll consider what you say.

8 And the other one is to have an understanding or
9 have a ruling if there's no understanding of what's been
10 previously settled by -- this isn't a clean case, this
11 isn't -- we're not writing on a new pad here. There are
12 things that happened historically in the case and that were
13 addressed by the appellate opinion that are the law of the
14 case and that hobbles or narrows what it is the jury can do.

15 So at the risk of getting into deep confusion, let
16 me ask the plaintiff, is it your position that the registered
17 mark The Backyard is first and singularly incontestable and
18 that the marks Backyard and Backyard BBQ are within the zone
19 or penumbra of the registered mark such that they are
20 entitled to that same protection?

21 MR. ADAMS: That is the plaintiff's position, your
22 Honor. That's been the law in the Fourth Circuit for at
23 least 60 years. Lone Star Steakhouse, Lone Star Grill, Glass
24 Doctor, Windshield Doctor, there are a number of other cases.
25 All of those cases -- even though the marks were literally

1 somewhat different, the Fourth Circuit concludes -- in fact,
2 the district court also concluded and the Fourth Circuit
3 affirmed that even with those distinctions, Windshield Doctor
4 vs. Glass Doctor, that the marks both fell within the, as you
5 say, penumbra or the shadow of the registration. That's the
6 position that's been held by the Fourth Circuit for as long
7 as I know. There are some circuits, the Third Circuit, for
8 example, that has a stricter rule about that, but that was --
9 I think, if I'm not mistaken, your Honor, you held that --

10 THE COURT: I think so.

11 MR. ADAMS: -- in the summary judgment order.

12 THE COURT: And that's --

13 MR. ADAMS: That was not disturbed by the Fourth
14 Circuit.

15 THE COURT: Two things. First, that's not in my
16 opinion, but I'll listen, that's not a factual question,
17 that's a legal question --

18 MR. ADAMS: Correct. Absolutely.

19 THE COURT: -- so the jury doesn't ever get that as
20 a factual matter.

21 MR. ADAMS: No.

22 THE COURT: And second, I think that that part of
23 the earlier decisions in the case is undisturbed by the
24 Fourth Circuit.

25 MR. ADAMS: Again, the Fourth Circuit vacated and

1 remanded based on what it considered to be issues of fact
2 that had not been resolved. There's nothing in the Fourth
3 Circuit opinion that disturbs any of the legal conclusions
4 your Honor reached except the ultimate one, of course, of
5 infringement.

6 THE COURT: Do you take issue with that?

7 MR. HOSP: Your Honor, we disagree. We believe
8 that the Fourth Circuit cases that Variety is citing, what
9 those cases stand for is the proposition if you have a
10 registered trademark, that you can infringe that trademark if
11 you use a mark that isn't identical but is confusingly
12 similar, but the registration only covers what is registered.
13 You cannot extend the presumption of protection beyond that
14 mark. The question is whether or not there is a confusingly
15 similar use. That's the way the cases break down.

16 And as far as the decision from the Fourth Circuit,
17 we did appeal that issue. The Fourth Circuit didn't reach
18 that issue because --

19 THE COURT: They denied your summary judgment.

20 MR. HOSP: They did deny -- they denied both
21 summary judgments, that's correct. They didn't reach the
22 issue of whether or not there was a presumption of the
23 litigant that attaches to two separate marks that were
24 actually not registered. Now, again, there was --

25 THE COURT: If these marks are -- again, it's a

1 question of law. If these marks are outside the registration
2 and not entitled to protection as if registered, then their
3 only validity would be as common law marks, and the Fourth
4 Circuit didn't say anything about that and you didn't prevail
5 on that. You would have prevailed as a matter of law and
6 gotten summary judgment on the registration of Backyard,
7 standing alone word, and Backyard BBQ, if they were not
8 entitled to any registration.

9 MR. HOSP: Well, your Honor, in the footnote,
10 footnote five of the Fourth Circuit decision, what it says is
11 because we find that the District Court erred in its
12 likelihood of confusion analysis -- and this alone is
13 sufficient to vacate and grant the summary judgment in
14 Variety's favor -- we need not address whether Variety's
15 marks are protectable. So the Fourth Circuit acknowledged
16 that there was a question of protectability regarding at
17 least some of Variety's marks.

18 THE COURT: Okay.

19 MR. ADAMS: Your Honor, that's clearly a
20 mischaracterization of what the Fourth Circuit said, but just
21 to close the loop on this, our proposed instruction number 3,
22 part of what it says is: The registration should be broadly
23 construed, registration, and the scope of rights is not
24 limited to the statement of goods/services in the
25 registration, but includes goods/services that would be

1 thought by consumers to come from the same source under the
2 same trademark.

3 And that particular case is the Super Duper case.
4 Judge Floyd was the judge and when it was appealed, the
5 Fourth Circuit said in the Super Duper case, quote, the jury
6 instructions as a whole adequately and correctly stated the
7 controlling law. I think -- and it's strictly a question for
8 your Honor. That is not an issue that should go to the jury.

9 THE COURT: Right.

10 MR. HOSP: Your Honor, just to be clear on that
11 case, it's our understanding that that case was in the
12 context of likelihood of confusion. We don't dispute that
13 when it comes to the question of likelihood of confusion,
14 that is an issue where you can argue that related goods can
15 actually be confused and somewhat dissimilar marks can be
16 confusingly similar. The question is whether or not validity
17 applies to marks and goods that are outside what is on the
18 register.

19 Your Honor, this is why parties when they register
20 it, they often register for different goods. They often
21 increase the number of goods that they register things on,
22 because even though there's a related good, they are not
23 covered by the registration and don't have the imprimatur of
24 validity unless and until they're registered. Thank you.

25 MR. ADAMS: Your Honor, just one more point. That

1 could not be more wrong. The goods and services descriptions
2 in the Trademark Act are there for administrative
3 convenience. They do not have any legal effect whatever, and
4 I'm surprised to hear Mr. Hosp say they do. The Trademark
5 Office is divided into about 35 categories and the only
6 reason it's there, the only reason it's there, is to provide
7 some ability for the Trademark Office to divide the
8 administration up into various groups that do various
9 searching. There has been many proposals to do away with
10 classifications altogether because, of course, people do
11 searching by computer now, but again, the case law is clear.
12 The registration should be broadly construed. That's the
13 last word from the Fourth Circuit.

14 THE COURT: Let me take a recess. Do you have
15 copies of your proposed instruction? Give them to the
16 clerk --

17 MR. ADAMS: We do, your Honor.

18 THE COURT: -- while we're in recess.

19 (Recess at 10:16 a.m. to 10:56 a.m.)

20 (Open Court)

21 (No jury present)

22 THE COURT: This is the verdict form. You can show
23 it to the lawyers.

24 (The clerk providing the verdict form to plaintiffs' counsel;
25 plaintiffs' counsel perusing form. The clerk providing

verdict form to defense counsel; defense counsel perusing
form)

THE COURT: I'm going to tell the jury the following: In order to prove trademark infringement, the plaintiff must establish by a preponderance of the evidence two things. First, that the plaintiff's trademark is protectable; and second, that the defendant's use of a competing mark was likely to cause confusion.

The Court finds that as a matter of law the plaintiff's marks, The Backyard, Backyard, and Backyard Barbecue are all protectable. The only question then for the jury is whether the defendant's use of Backyard Grill + Design was likely to cause confusion in connection with plaintiff's marks. If you find that the defendant's use of Backyard Grill + Design mark was likely to cause confusion, you must find for the plaintiff. If you find that the use was not likely to cause confusion, you must find for the defendant.

There are nine factors you should consider in determining whether a likelihood of confusion exists. The strength of the distinctive -- or distinctiveness of the mark, the similarity of the marks, the similarity of the goods and services that the marks identified, the similarity of the facilities that the two parties use in their businesses, the similarity of the advertising the two parties

1 use, the defendant's intent, actual confusion, quality of the
2 products and sophistication of the customers.

3 That's the essence of the jury instruction so you'll be
4 fore -- you have foreknowledge of it.

5 You all probably all object to everything I've said
6 and everything I'm going to do, but that's what I'm going to
7 do and I'm ready to -- giving you notice of it and you can
8 appeal and go --

9 MR. ADAMS: Your Honor, I feel constrained to make
10 at least one comment.

11 THE COURT: I can't hear you.

12 MR. ADAMS: I feel constrained to point out that
13 the plaintiff believes there should be an issue of
14 willfulness that goes to the jury. And the reason I say that
15 is that on page 21 of the Fourth Circuit's opinion it says,
16 viewing these facts in the light most favorable to Walmart,
17 we conclude there is a genuine issue -- I'm sorry -- a
18 genuine dispute as to whether Walmart intended to infringe.

19 You know, I disagreed with that when I read it. My
20 understanding is that willfulness and intent is an equitable
21 determination that is typically made by the district court.
22 But nevertheless, the plaintiff's view is that this is a part
23 of the Court's mandate, your Honor, and that's why we had
24 that second issue that we tendered to the Court. And I
25 really don't want to run the risk of coming back because we

1 didn't give an issue to the jury, which took up a large
2 percentage of the time these past two days.

3 One other point of clarification, your Honor. I
4 believe at the very beginning of the trial, your Honor
5 indicated that there were five factors that the Fourth
6 Circuit indicated Walmart had waived, and that I believe I
7 heard your Honor say that you were going to instruct the jury
8 on that question. Now, whether or not your Honor does, we
9 would like to point out to the jury in my closing statement
10 that that is, in fact, the case. In other words, there are
11 several issues that have already been determined by the Court
12 and that for that reason, the jury only has to consider the
13 four specific issues which the Fourth Circuit addressed in
14 its opinion.

15 THE COURT: Well, but the Fourth Circuit left open
16 the weight that would be placed by the jury on those factors.

17 MR. ADAMS: Fair enough, but I still think it's
18 fair to say that those factors have been determined. I think
19 Mr. Puzella was right on Monday when he pointed out that,
20 well, those factors may still be weighted somehow, but in the
21 aggregate those factors, I think the Fourth Circuit made it
22 clear, have been waived. So it's not like the jury has the
23 option at this point to decide that, for example, the goods
24 and services aren't the same because the Fourth Circuit said
25 they were.

1 THE COURT: Okay. All right. I'm going to add the
2 word after "therefore" in the last phrase "willfully
3 infringing," to have the issue include willfully.

4 MR. ADAMS: I think it would be better, your Honor,
5 to give the jury a separate issue on willfulness, but however
6 your Honor wants to do it.

7 THE COURT: Okay.

8 MR. HOSP: Your Honor, just for the record, we do
9 object to the instruction on validity, and we believe that
10 there should be an instruction that continuing use after
11 notification does not constitute intent, but those are the
12 only objections for the record.

13 Thank you, your Honor.

14 THE COURT: Okay.

15 MR. HOSP: Apart from the objections that we have
16 obviously previously filed.

17 THE COURT: Okay.

18 Bring the jury back in. Are you ready to start
19 your closing?

20 MR. ADAMS: I am, your Honor.

21 THE COURT: All right.

22 Bring the jury in.

23 (Jury in at 11:03 a.m.)

24 THE COURT: All right. You can be seated.

25 We're now ready for the closing arguments. The

1 plaintiff will be first because they have the burden of
2 proof.

3 The jury can be with the plaintiff for closing
4 argument.

5 **CLOSING ARGUMENT**

6 (By Mr. Adams)

7 Jury duty is an important responsibility and
8 Variety and its attorneys appreciate your careful attention,
9 and we particularly appreciate the fact that you were taking
10 notes because I think that that will assist you in your
11 deliberations.

12 This has been an interesting case, hasn't it?
13 You'll probably never look at a circle R or a TM without
14 thinking about the two or three days you spent in court and
15 you remember, seems like a year ago but it was actually only
16 three days ago, I mentioned at the very beginning that you're
17 the experts here. But whatever experts you were in trademark
18 law three days ago, think how much more you've learned about
19 this fascinating, exciting field that we've been discussing.

20 I told you a couple days ago that this was a simple
21 matter. And despite the army of Walmart employees who have
22 marched to the witness stand in perfect lockstep to tell you
23 how innocent and above-board Walmart has been, the truth is
24 different. And I am going to take some of my time to tell
25 you why that is so, but first things first.

1 There are several factors to be considered when
2 determining trademark confusion. And you can see those on
3 the board. The strength of the marks as actually used in the
4 marketplace; the similarity of the marks to consumers; the
5 similarity of the goods that the marks identify; the
6 similarity of the facilities; advertising, Walmart's intent,
7 actual confusion, the quality of Walmart's product, and the
8 sophistication of the consuming public. And there are really
9 only two or three of those factors that can be fairly said to
10 be in dispute here. Clearly, the parties disagree about
11 whether or not the term Backyard Grill and Backyard Barbecue
12 are the same.

13 Despite all the hair-splitting by Walmart over the
14 difference between the term "grill" and "barbecue," the fact
15 is that those terms are merely synonyms of each other and
16 descriptive terms that tell the consumer what the product is.
17 The dominant part of both trademarks is identical, the word
18 Backyard. You've heard that testified to by many witnesses
19 during these past few days.

20 So, you're the experts on that question, and
21 there's nothing that calls more readily for exercise of your
22 own common sense and your own life experience than asking or
23 answering that simple question.

24 The other factor you'll need to consider is
25 Walmart's intent. Its willful infringement of Variety's

1 trademark. And the evidence is equally clear, but more about
2 that later.

3 A couple of days ago I told you about all the
4 excuses you were going to hear from Walmart, and I think I
5 was spot on. Walmart made the excuse that it does not use
6 Backyard as a trademark. You know now that that's not true.
7 The fact is that Walmart filed its own trademark application
8 and used the TM to tell the public that it was Backyard that
9 was their trademark. It's another fact that Walmart told the
10 Trademark Office that "grill" was the descriptive part of its
11 trademark. And you remember seeing the exhibit where they
12 disclaimed it. They said they disclaim the term "grill" as
13 descriptive. The dominant source of the trademark, the
14 dominant source identifying part of the trademark, is
15 Backyard.

16 Another excuse that we heard from Walmart, well, it's
17 okay to infringe because of all these other uses. In fact,
18 the trademark chart that Mr. Puzella put up behind him during
19 his opening statement was demolished by Mr. Blackburn. Every
20 single one of those registrations was either dead or totally
21 unrelated to the reason that we're here to talk about grills
22 and grill accessories and things of that sort.

23 This was a somewhat deceitful tactic on Walmart's
24 part that back-fired. And it really shows what Walmart is
25 willing to do to win this case. The alleged third-party

1 evidence was extremely misleading and, frankly, I've never
2 seen anything quite this bad from a party in a lawsuit and
3 I've been practicing trademark law for 40 years.

4 Trademark registrations are meaningless by
5 themselves and really don't actually prove any use. And you
6 remember that both Variety and Walmart filed applications
7 that were called Intent to Use applications. Do you remember
8 that? They were trademark applications that were filed even
9 before the trademark had begun being used.

10 So on top of everything else, including this
11 misleading chart, Walmart hired a private investigator, Mr.
12 Puglisi, to go out and try to find some evidence of
13 third-party uses and what did he find? He found that one box
14 that looks like it's been hidden in the back of some
15 warehouse for 10 or 20 years at Fred's. And Fred's was the
16 one that said they weren't going to sell them anymore and
17 apparently -- they may have sold this one to him, we don't
18 know how he managed to buy it, but look at it. It's in a
19 wreck. From the look of the box, it looks like it's been
20 sitting somewhere for a long time, and we'll never know the
21 circumstances under which Mr. Puglisi acquired it.

22 Despite Walmart's efforts, there's no evidence of
23 significant competitive third-party use in the marketplace.
24 After Walmart -- well, after Walmart got caught presenting
25 this evidence that really didn't turn out to be quite what

1 they characterized it to be, we really know nothing about the
2 actual commercial impact on Variety's trademark from anything
3 that Mr. Puglisi said.

4 So ask yourself this question. And here again,
5 this is a common sense question. This is on the issue of the
6 wide use and so forth. Were you aware of a large number of
7 Backyard branded products before this trial started? If not,
8 can it be true that there are so many Backyard products and
9 trademarks in use around the United States as claimed by
10 Walmart? Common sense and your own life experience provides
11 the answer.

12 Here's another excuse. It's okay for Walmart to
13 infringe because Variety was not a competitor. Can't be
14 right based on the evidence. Cannot be right. Everything
15 you heard in the record was that Walmart was a competitor.
16 But giving Walmart the benefit of the doubt, they said, well,
17 they're not in the same category as Home Depot and some of
18 the others. That doesn't mean they weren't a competitor and,
19 in fact, Ms. Dineen testified that, in fact, they were.

20 Here's another excuse. It's one I'll call empty
21 head, pure heart. Walmart did not know that Variety -- what
22 Variety was doing. They only knew about its trademark
23 registration. What are the facts? This simply cannot be
24 true. The excruciating detail that exemplifies everything
25 that Walmart did for four months says otherwise.

1 Brainstorming teams, legal teams, survey teams, brand teams,
2 repetitive trademark searches. Walmart even admits going to
3 Home Depot, Target and some other competitors.

4 Do you really believe that Walmart, when it learned
5 of its competitor Variety's trademark registration for
6 Backyard, which they admit they did, simply did nothing as
7 they claim? Remember that Ms. Dineen testified that Walmart
8 learned of Variety's Backyard trademark from its legal team.
9 Do you really think Walmart's lawyers told Walmart that it
10 was okay to use Variety's trademark? If they had, they would
11 have come here and told you that. In fact, you heard Walmart
12 witnesses testify that they backed away from using Backyard
13 twice after talking to their lawyers.

14 So even after backing away from Backyard twice,
15 after Grill Master was found to be unavailable -- you
16 remember that -- Walmart decided that it wanted to use
17 Backyard Barbecue after all. Then, for reasons that Walmart
18 has refused to explain to us -- when I say us, literally that
19 means you, has refused to explain to you -- they made a
20 last-minute change to Backyard Grill. And I'll have a little
21 bit more to say about that later.

22 But this last-minute change is significant.
23 Walmart spent a lot more time on this rebranding project than
24 it intended. It was over four months. You remember that Ms.
25 Dineen said that they had originally decided on Grill Master,

1 which I just mentioned a moment ago. A very well-known
2 trademark with high ratings. And by the way, this is some of
3 the best evidence that disproves Walmart's claim yesterday.
4 They really didn't want a good trademark. Does that make any
5 sense to you, that a company the size and wealth of Walmart
6 would simply decide, we don't really want a good trademark?
7 The fact that Grill Master -- which you may remember ranked,
8 I think, either first or second -- was one of the very best
9 trademarks, just makes that claim ridiculous. And the only
10 reason Walmart didn't select or didn't use Grill Master as
11 you remember, again, because it was licensed to someone else
12 and wasn't available in 2013.

13 So after pursuing Grill Master only to learn late
14 in the game that the trademark was already licensed, these
15 delays meant that Walmart was in a deep hole. Remember Ms.
16 Dineen's testimony that the Backyard Grills arrived early in
17 December of 2011 for the 2012 selling season? She was wrong.
18 What happened was they arrived too late for the 2011 selling
19 season because of all these delays I've just told you about
20 and you heard about from Walmart's own witnesses. Walmart
21 was out of time.

22 So what did they do? These products had to be
23 sourced in China, manufactured and shipped from China to the
24 U.S. and then to the stores. And so Walmart quickly made a
25 change from Grill Master to Backyard Barbecue. Then the

1 trademark search. So finding out at the last minute from the
2 legal team's trademark search about Variety's Backyard
3 trademark registration was a nasty surprise. A nasty
4 surprise. And as you heard from Walmart's witnesses, they
5 made a further change from Backyard Barbecue or BBQ to
6 Backyard Grill.

7 Now let's talk about likelihood of confusion for a
8 minute. You'll likely hear a lot about actual confusion from
9 Walmart, but not too much about likelihood of confusion. In
10 fact, the dominant part of the trademarks and the goods and
11 services are the same. And when that's true, as here, it's
12 almost impossible for there not to be a likelihood of
13 confusion. And again, just exercise your God-given common
14 sense. You know that has to be right. They're selling
15 almost exactly the same products. Variety sells somewhat
16 more, but basically there's a substantial overlap. And the
17 dominant part of the trademarks are identical, Backyard. So
18 how can there not be a likelihood of confusion?

19 The difficulty is that in many cases, as here, the
20 confusion is difficult to detect simply because in most every
21 case the consumer doesn't know he or she is confused. So
22 again, use your common sense, your own life experience. How
23 likely is it that a customer for a grill first learns that he
24 or she is confused and then is able to communicate this
25 confusion all the way up to Walmart's corporate headquarters

1 in Bentonville, Arkansas? Does that make any sense? No.

2 Walmart's surveys experts provided unintentional
3 support for Variety's case, not Walmart's. You heard both
4 Mr. Poret and Mr. Mantis describe surveys they designed that
5 were calculated not to show confusion but did anyway, and
6 applied to billions of dollars of infringing sales and over
7 100 million individual consumers reveal a vast amount of
8 confusion. And you heard testimony to that effect. Mr.
9 Hollander and Mr. Klein provided clear, straightforward
10 explanations of the way Walmart's surveys experts tried to
11 rig the surveys in Walmart's favor.

12 And poor Mr. Van Liere. The best he could do with
13 his Internet survey was to establish that almost 40 percent
14 of the survey respondents were more likely to buy a grill if
15 it had a Backyard trademark on it.

16 So identical trademarks, identical goods and
17 services, significant confusion, false and misleading
18 testimony about third-party uses, misleading testimony that
19 Walmart really wanted a poor, weak trademark. This is what
20 Walmart is faced with and cannot rebut.

21 Now I'm going to sit down and let you hear from
22 Walmart's attorney and let's see if he can explain why black
23 is white and wrong is right. Depending on what Mr. Puzella
24 says, I may have something else to say about willfulness when
25 I finish my statement.

1 Thank you very much.

2 THE COURT: Thank you.

3 The jury can be with the defendant.

4 MR. PUZELLA: Thank you, your Honor.

5 **CLOSING ARGUMENT**

6 (By Mr. Puzella)

7 Good morning.

8 There is one thing about that closing that I agree
9 with. That's to thank you for the week that you -- or few
10 days that you spent with us. This is not what you do every
11 day, this is what we do every day, and we appreciate the time
12 and attention you've given us. We really do.

13 As I said, that's the only thing I agree with. I
14 have some material that I've already prepared, but I want to
15 start with a reaction to what I just heard. What is this?
16 This is a trademark case. It's a trademark case where the
17 plaintiff, Variety, has the burden of proof. Variety has to
18 prove that consumers are likely to confuse Walmart's products
19 with Variety's products.

20 That entire closing was about Walmart's case. You
21 heard nothing, nothing, about what Variety proved, because
22 Variety didn't prove anything. This is a trademark case.
23 We've been here for two and a half days. And the closing
24 didn't show you the trademarks. The closing didn't show you
25 the products. You're trying to figure out whether consumers

1 in the real world are going to be confused when they see
2 products on the shelves. You all look at products and you
3 all look at the marks and how they appear on those products.
4 Those products are here. They were just over there. They
5 weren't far away.

6 This is Walmart's product. (Indicating). And I
7 can talk about the specifics of what it looks like, but it's
8 pretty distinctive. This is Variety's product. It's also
9 different. (Indicating). It's not identical. Counsel just
10 said that the marks are identical. They're not identical.
11 That is a gross overstatement. And the products themselves,
12 their overall appearance, is strikingly different. That's
13 what this case is about. Variety didn't demonstrate that it
14 carried its burden to demonstrate the likelihood of
15 confusion. It just wants to throw mud at Walmart. All
16 Walmart's done is defend itself.

17 Let me walk through the evidence that you heard.
18 There's no dispute that Walmart's and Variety's products are
19 similar types of products. There's no dispute that its
20 customers are the similar type -- they're the same folks.
21 There's no dispute that the type of advertising the parties
22 use is the same. The circulars. The packages themselves.
23 And the types of customers, they're the same. Same types of
24 people. People who want to be -- want to buy these sorts of
25 products.

1 The only things you need to think about, the only
2 things that are in dispute are the strength of the mark
3 Backyard, is it common in the marketplace; the similarity of
4 the marks, how do they appear in the marketplace; Walmart's
5 intent; and the presence or absence of actual confusion.
6 Those are the four things that really ought to carry this
7 case. So let me take those in turn.

8 On strength. The word Backyard is widely used in
9 the marketplace. Mr. Blackburn admitted that in his
10 testimony. The demonstrative I used in the opening was not
11 demolished. At the time I presented my opening I mentioned,
12 I believe, that you're going to have to apply some discipline
13 to the evidence at some point. That's exactly that
14 situation. Some of those marks are live today. They were
15 marked earlier as unrelated goods.

16 You saw the Puglisi chart earlier and Backyard
17 Chef, that's not unrelated. They're grills. Some of them
18 were marked dead. Perhaps today, but we're talking in this
19 case about 2011. That's the sort of discipline you have to
20 apply to the evidence. What was the real world in 2011. Not
21 in 2018.

22 You'll remember that Mr. Blackburn went through the
23 admissions that Variety signed in 2012. It admitted that
24 there were approximately 40 registrations using Backyard
25 marks; that they never opposed those registrations and they

1 never opposed the uses.

2 We saw other examples of how common Backyard is in
3 trademarks. Mr. Blackburn talked about the letters that
4 Variety and Fred's exchanged in 2009. In Fred's letter back
5 to Variety, what did Fred's say? You don't have any rights.
6 Everybody uses Backyard. And Fred's identified a variety of
7 other uses. Texas Backyard, Simply Backyard, Backyard
8 Botanical, Backyard and Beyond, Backyard Treasures, Backyard
9 Designs, Backyard Bunch, H-E-B Texas Barbecue.

10 And what did Mr. Blackburn testify? There was no
11 investigation done about those other uses after they received
12 the letter. They didn't do anything. And they think this is
13 a strong mark? You get a letter from another company, a
14 competitor that says, hey, you don't have any rights --
15 here's six or seven other uses -- you don't do anything?

16 We also heard from Variety's expert, Mr. Klein. He
17 was on yesterday in response to some of our experts. Mr.
18 Klein told you that both parties' marks are commercially
19 weak. And he also told you that it was Variety's counsel who
20 told him that. He didn't tell you that today. He told you
21 the opposite. But he told their expert they're weak. Ought
22 to use this design for the survey, not that design for the
23 survey. We didn't hear any of that.

24 Walmart's private investigator, Mr. Puglisi, told
25 you that he identified a dozen products that used Backyard in

1 connection with grills and grill stores. You saw the board.
2 That was methodically walked through. He called every store.
3 He put the material in the carts. Those are not dead uses,
4 they're real uses. In fact, he told you he called them last
5 week. And they're not the sorts of things that are one-off
6 or distant or what-have-you. The Brinkmann's product was
7 sold at Home Depot. We all know what Home Depot is. The
8 other products were -- some of the products were sold at Bass
9 Pro Shops, and you all know what Bass Pro Shops is. Those
10 aren't neighborhood stores across the country, those are
11 stores that sell everywhere. You heard nothing to challenge
12 those uses.

13 Ms. Dineen, who was in charge of Walmart's Backyard
14 Grill brand, told you that she knew of several other uses. A
15 variety of registrations that she was aware of at the time.
16 You have Backyard World for grills, Backyard City for grills,
17 Backyard Chef for barbecue grills, Backyard Basics also for
18 grills, Backyard Classic for barbecue grills. These exist.

19 Ms. Dineen also told you that the Backyard Grill
20 brand was not expected to drive Walmart's sales. The
21 internal survey work that Walmart did before they launched in
22 2011, before they knew about Variety's use of Backyard,
23 showed that Backyard marks, whether it's Backyard Grill or
24 Backyard Barbecue, would not drive sales. When asked the
25 question, imagine you were at a Walmart and need to purchase

1 grilling items such as a grill, grilling accessories or
2 charcoal, assuming cost and benefits are the same across all
3 brands, please pick which three you are most likely to
4 purchase based on their name. Backyard BBQ and Backyard
5 Grill, two percent each in the first position. That is not a
6 strong mark.

7 Mr. Deshommes, who was responsible for the private
8 brand project, told you about the research that also
9 demonstrated the weakness of Backyard. I'm not going to read
10 the bullets, but when you're in the jury room look at Exhibit
11 D-56.

12 Mr. Ortiz, he was here yesterday. He was in charge
13 of the entire product category. He came in after the mark
14 was selected. He told you that Walmart launched the same
15 product with no name on it at all. What happened? Nothing.
16 Sales stayed the same. Shoppers didn't complain, the stores
17 didn't complain. They didn't hear a thing. Because Backyard
18 Grill is weak. It's not the thing that people want to buy.
19 It doesn't matter.

20 Walmart's survey expert, Dr. Van Liere, also
21 testified about his survey concerning purchaser motivation.
22 He asked purchasers to rank various attributes in the
23 products that they thought that caused them to buy it and
24 brand was near the bottom. It's not the sort of thing that
25 causes people to buy it. He told you that told him that it

1 was a weak mark.

2 Now, what does Variety offer in support of the
3 strength of its mark? You didn't hear this in Variety's
4 closing, but you may remember this testimony. The strength
5 of Variety's mark turned on basically two pieces of evidence.
6 At one time Mr. Blackburn testified, I think it was in 1998,
7 that some other company called them up and said, hey, can we
8 maybe license or buy your The Backyard registration, your
9 trademark? Mr. Blackburn told you that, well, that evidence
10 is it's a strong mark, it's worth something. But that's all
11 we know, that someone asked. There were no terms exchanged,
12 there was no deal signed. We don't know a thing about what
13 that third party would have paid, what that third party would
14 have discovered when it did its due diligence before it wrote
15 a check and looked around and said, oh, gosh, there's a lot
16 of folks out here that use Backyard, why are we paying for
17 this? So that offer doesn't tell you anything about the
18 value of Variety's The Backyard mark.

19 What else did we hear from Mr. Blackburn as
20 evidence concerning the strength of their mark? We asked
21 Fred's to stop. We wrote them a letter and they said, yeah,
22 we'll stop in 2009. Remember Mr. Blackburn told us that they
23 didn't have a written agreement about that. We all had to
24 take his word for it. 2009. Mr. Puglisi the next day
25 testified he bought a Backyard Traditions from Fred's in

1 2014. 2014. That's five years later.

2 With respect to the box of the Fred's grill,
3 Variety points to the fact that it's a little banged up.
4 It's been in this case for a long time. But you don't even
5 have to look at the box. Mr. Puglisi presented an image of
6 the box on the shelf in the store in 2014. Those are not
7 products that are in some warehouse, those are products on a
8 shelf that are available for sale.

9 Weigh the evidence you heard on the strength of the
10 mark. In the opening Variety compared The Backyard to Tony
11 the Tiger, Crest and Nike. It is not Tony the Tiger, Crest
12 and Nike. You all know those brands. There is one company
13 that sells those brands.

14 The evidence shows that Backyard, as Mr. Blackburn
15 admitted, is widely used. It's incredibly weak and it's not
16 a likely source of confusion among consumers.

17 Another reason there's no likelihood of confusion
18 is the marks are different. Shoppers can tell them apart,
19 you can tell them apart. As I predicted in my opening,
20 Variety focused merely on the presence of the word Backyard
21 and nothing else. This whole -- all of Variety's case is the
22 fact that the word Backyard appears on both products.
23 There's lots of products that have backyard on them, but
24 there are other differences that the consumers see that tells
25 them who makes it. And it eliminates the prospect for any

1 confusion.

2 You heard from Mrs. Dineen and Mr. Deshommes, who
3 told you the reasons behind their branding, the packaging.
4 They wanted a descriptive name that fit with the category.
5 They wanted one that would not cause harm. But they wanted
6 one that was a little different from all the other Backyards
7 out there, so they added Grill because nobody else used
8 Grill, and they took the "I" out of Grill and they put a
9 little logo in, and they made Backyard small and made Grill
10 big, and they made this little design. Because they wanted
11 to be a little different. They wanted it to be distinctive.

12 And they also shopped their real competitors like
13 Home Depot, Lowe's, K-Mart and Menard's to see what the
14 packaging looked like. What colors did the marketplace use,
15 what kind of imagery did they use. Mr. Deshommes showed you
16 a document at that period prior to their knowledge of Variety
17 where it recognized the opportunity to distinguish yourself
18 is to call out the features. Call out the name of the
19 product ahead of the brand name. What did they do? They did
20 exactly that.

21 Ms. Dineen walked you through the brand guideline,
22 right? You remember this document. Turn to the brand
23 guideline and you'll see the mark -- the name of the product
24 is bold, it's in red against a black background. It's
25 contrasting and it's huge. That's the thing that people see

1 when they're looking at these products on the shelf. The
2 logo is half the size of the product. Grill is more
3 prominent than Backyard. The logo in Grill is more prominent
4 than Backyard. Backyard, the word, is half again the size of
5 Grill. It's gray on a black background. As Ms. Dineen
6 testified, it's in a secondary position.

7 Walmart's mark and packaging is very consistent.
8 You saw the presentation that we're looking at behind me.
9 Ms. Dineen explained that the goal of the rebranding was to
10 de-clutter the space. They had suppliers that were giving
11 them product that were the same product but named different
12 things. They used different logos and different colors and
13 it was just a mess. The point of this project was nothing
14 about Variety. They didn't know about Variety's use of
15 Backyard with grills. The point of the project was to make
16 everything look good and seamless so people could buy the
17 products and that's what they did. When you look at the
18 products when you go back into the jury room, you'll see that
19 Variety's products look different. You can tell the
20 difference.

21 Remember that you heard a few moments ago when you
22 heard from Mr. Blackburn that the marks are identical.
23 They're not. Use your common sense. You can tell the
24 difference. Just the shoppers can tell the difference.

25 Next you'll have to consider whether Walmart

1 intended to confuse consumers. There's simply no evidence
2 that Walmart intended to confuse consumers. You haven't
3 heard it. Again, this is Variety's burden of proof. Walmart
4 doesn't have to prove anything. They have to prove that
5 Walmart -- that Walmart intended to cause confusion.

6 Ms. Dineen told you that Walmart didn't know about
7 Variety's use of Backyard on grills at the time that they
8 picked the mark. How can you intend to cause confusion when
9 you don't know about a particular mark? Mr. Deshommes, who's
10 in charge of the whole product, told you he didn't even know
11 about Variety when they picked the mark.

12 Walmart did, of course, know that lots of other
13 companies use Backyard. You heard plenty of testimony about
14 that and you saw that evidence. So it was perfectly
15 reasonable for Walmart to decide to go to market with its
16 different-looking product. It wasn't reckless, it was
17 reasonable.

18 Variety also tries to suggest that Walmart's
19 decision to continue selling after Variety complained is
20 somehow improper, but that doesn't make any sense. As Mr.
21 Ortiz told you yesterday, Walmart did its due diligence. It
22 picked a different name that it thought no one used. It
23 didn't hear anything in the marketplace about confusion.
24 There wasn't a requirement that it should stop.

25 Think about Variety's argument. If a company gets

1 a request to stop using a mark, that company must immediately
2 stop or they're acting in bad faith. That's ridiculous.
3 That would make all of this unnecessary. You're entitled to
4 take a good-faith, reasonable look at the allegations and
5 say, I disagree. Let's go to court. Let's have a jury
6 decide, without the consequence of that being characterized
7 as intent to confuse. When you look at the evidence you'll
8 see there's no evidence of an intent to confuse consumers.
9 Remember, it's Variety's burden.

10 Finally, you're going to have to consider actual
11 confusion. Here again, there's no evidence of actual
12 confusion. As I said in my opening, you're going to need to
13 decide the question of whether there's a likelihood of
14 confusion. The best evidence of whether there's a likelihood
15 of confusion, whether consumers in the real world are likely
16 to be confused, is whether consumers in the real world are
17 actually confused. There's not. You haven't heard any
18 evidence, you haven't seen any shoppers come up and testify.
19 You haven't seen any store employees testify about
20 experiences they had trying to help a shopper return a
21 product, assemble a product, complain about a product. We
22 heard lots of evidence over and over again that Walmart sold
23 millions of products over a four-year period. Millions. Not
24 one shopper evidenced confusion. Not one. And there's a
25 likelihood that people will be confused?

1 Mr. Blackburn, Variety's witness, admitted that
2 there was no actual confusion. They had no evidence of it.
3 He tries to avoid that inconvenient fact by saying, well, we
4 wouldn't have heard about it. There's no way for us to get
5 news from the stores to the home office. Wouldn't happen.
6 In the real world, if marketplace confusion is a concern, the
7 home office sends a memo to the stores and says, hey, if
8 anyone comes in and says anything funny about grills, call
9 Mr. Blackburn. Please. We need that information. They
10 didn't do that.

11 But put that aside. If confusion was really an
12 issue in the marketplace, Variety and Walmart would know.
13 There were too many opportunities for it to occur. David
14 Ortiz told you that he gets e-mails and phone calls every day
15 from stores all across the country about the most minuscule
16 things. And they have systems set up so that all sorts of
17 issues can filter up to executives, people on his team, and
18 they have to clear those things on a daily basis or within
19 48 hours or they get red lights and green lights and all
20 sorts of colors on their desktops. They're focused on these
21 sorts of issues, at least Walmart is.

22 Finally, you heard from Mr. Poret and Mr. Mantis,
23 Walmart's two experts. They both testified that they
24 performed surveys that were intended to mimic the real world.
25 The criticisms that Variety's experts lodged were not

1 about -- were really trying to focus on things that were not
2 in the real world, right? The point of those surveys was
3 trying to mimic how the sales actually happened. The fact
4 that Variety only sells in its store and Walmart only sells
5 in its store, those sorts of things. Importantly, Mr. Poret
6 told you his survey showed zero likelihood of confusion. Mr.
7 Mantis told you that his showed 1.7 percent. Mr. Mantis told
8 you that anything less than ten percent is evidence of the
9 absence of a likelihood of confusion. That is undisputed.

10 Two Variety experts came on the stand afterwards.
11 Neither of them told you that something under ten percent
12 could evidence confusion. You didn't hear that from them.
13 You heard that from counsel. That's argument.

14 Now, you may hear some math about applying that
15 1.7 percent that Mr. Mantis found in his survey to the total
16 number of sales that Walmart made and that's evidence of
17 actual confusion. Mr. Mantis disagreed with that. He said
18 that's not how you use these surveys, you're not supposed to
19 do that kind of math.

20 But you don't have to take Mr. Mantis' word for
21 that because -- probe your memories -- the two experts that
22 Variety put on didn't do that math. They didn't take the
23 position that you could take that 1.7 percent and multiply it
24 times the number of sales that Walmart made and identify
25 actual confusion to the tune of thousands of people. Why

1 didn't those experts do that? Because they're experts. They
2 have reputations.

3 Ladies and gentlemen, there's no actual confusion.
4 And if you weigh all the evidence, you should find that
5 Variety has not carried its burden to prove the likelihood of
6 confusion. When you fill out the verdict form, Walmart asks
7 that you find no likelihood of confusion and enter a verdict
8 in favor of Walmart.

9 Thank you again for your attention this week. I
10 appreciate it.

11 THE COURT: The jury can be with the plaintiff for
12 rebuttal.

13 **REBUTTAL CLOSING ARGUMENT**

14 (By Mr. Adams)

15 Well, we're almost done. Ms. Trimmer just prepared
16 this slide based on what you just heard Mr. Puzella say. And
17 he just admitted that of the factors that you need to
18 consider, three, four, five, eight and nine is undisputed.
19 They weigh in Variety's favor. So really the only thing we
20 need to concern ourselves about is strength, the similarity,
21 Walmart's intent and actual confusion.

22 Mr. Puzella took Variety to task for not -- for
23 emphasizing Walmart's evidence instead of Variety's evidence.
24 Well, you heard -- we only had one witness, Walmart had quite
25 a number. You remember Mr. Blackburn's testimony going

1 through almost year by year how Roses had been bought by
2 Variety, how they were trying to sort of compete with Walmart
3 and how they are expanding their stores and trying to enlarge
4 their footprint and how this whole -- how the whole situation
5 came about, but let's go back and consider a few important
6 facts.

7 First of all, Walmart admits, admits, that
8 Variety's trademark is valid. That's admitted. So we can
9 start there. Ms. Dineen testified that when Walmart decided
10 to use Backyard Barbecue, there were many reasons why it was
11 a good trademark. Resonated with the customers, had a high
12 value. You heard one of Walmart's experts concede, as I
13 mentioned earlier, that when those considering Backyard as a
14 trademark, almost 40 percent indicated they would be more
15 likely to buy a grill if it had a Backyard mark on it.

16 Then Ms. Dineen said they had discovered another
17 trademark registration or application for Backyard. So
18 Walmart changed its Backyard Grill for its trademark, but
19 remember she refused to tell you about this registration or
20 any facts. Then Mr. Hosp backed her off of her testimony and
21 instead she said that there was a third-party user of
22 Backyard Barbecue, but still wouldn't give the name.

23 Of any trademark Walmart would want to parade in
24 front of you as proof of the weakness of Walmart's Backyard
25 Barbecue trademark, what would it be? Would it be the exact

1 same trademark being used by Variety? Of course it would.
2 If they knew of a third-party user of Backyard Barbecue, that
3 would have been on that chart in neon. Yet, this third-party
4 use did not show up on the chart Mr. Puzella showed you
5 during his opening statement. It said nothing found in Mr.
6 Puglisi's alleged comprehensive search. It was not located
7 by Mr. Blackburn's searching last evening and, of course, it
8 wasn't mentioned by Mr. Puzella just now in his closing.
9 There is no third-party user of Backyard Barbecue as claimed
10 without any actual facts by Walmart.

11 And you remember that Walmart's trademark attorney,
12 shortly after Backyard Grill was selected, filed a trademark
13 application and told the Trademark Office under penalty of
14 perjury that Walmart was aware of no other trademarks that
15 were likely to cause confusion with Walmart's Backyard Grill
16 trademark. Even though Walmart claims it had knowledge of
17 both Variety's Backyard trademark and this mystery
18 third-party user. I think I know why Walmart refuses to say
19 who the third-party user of Backyard Barbecue is. There was
20 no third-party user, it was Variety.

21 So let's use our common sense for a minute. Do you
22 really think Walmart, having gone through a vastly expensive
23 four-month campaign to choose another trademark, when
24 learning at the last minute of Variety's Backyard trademark,
25 would simply drop the Barbecue and add Grill but really

1 didn't care whether they were using it for, so Walmart claims
2 it never bothered to even visit a nearby Roses store to see
3 what Roses was doing.

4 And Mr. Puzella just talked about intent. Intent
5 does not relate or does not require an intent to confuse.
6 Intention or willfulness simply means that what you did was
7 deliberate in the sense of knowing what the facts were and
8 acting in accordance with those facts in an improper way. So
9 Walmart had its lawyers, Walmart had its experienced brand
10 people. They knew for a fact that you simply can't take
11 Barbecue or BBQ off of a trademark like Backyard and
12 substitute Grill and then there's no trademark problem.

13 Walmart can't admit that it knows about Backyard
14 Barbecue, which is not in the Trademark Office records. That
15 might have prevented Walmart from getting its own trademark.
16 So Walmart, when it filed its trademark application -- we saw
17 this before -- they simply said that we're not aware of any
18 marks -- and I'm just going to read the language to you.
19 What you have to say when you apply for a trademark and the
20 standard that's applied when you're determining infringement
21 is whether the mark is either in the identical form thereof
22 or in such near resemblance thereto. That's the legal speak.
23 And that's what Walmart's trademark attorney said they were
24 not aware of, either identical mark or a mark in such near
25 resemblance thereto as to cause confusion, mistake or

1 deception.

2 So here's what I think the true facts are. You'll
3 make up your own mind of course, but this is what I think --
4 this is what I think you come down to.

5 Walmart -- and this is all evidence in the
6 record -- Walmart took way too long to finish this project
7 for various reasons. The Grill Master setback and so forth.
8 In the spring of 2011 Walmart was under the gun to pick a
9 trademark quickly so it could get its goods in the
10 marketplace. In the spring, after losing the Grill Master
11 trademark, it chose the next best mark, Backyard Barbecue.
12 The legal team did a further trademark search. No argument
13 about that. Variety's Backyard trademark showed up. More
14 discussions with the legal team. After those discussions
15 Walmart backed away from Backyard, but the brainstorming team
16 was out of ideas. So they went back to Backyard anyway.
17 Undisputed.

18 The evidence permits the conclusion that Walmart
19 did, in fact, do a further investigation to determine that,
20 yes, Roses had a vast collection of goods all bearing the
21 Backyard trademark. Remember when we put Ms. Trimmer back up
22 on the stand to read Ms. Dineen's testimony? She finally
23 conceded, yes, potentially it could have been Walmart -- I'm
24 sorry, it could have been Variety that was the third-party
25 user. Strange that she wouldn't know that at this point.

1 So what is the evidence that supports this
2 conclusion? Well, Walmart's lawyers are smart, and no
3 competent trademark lawyer would have ever told Walmart that
4 they could safely sell a billion dollars of Backyard branded
5 goods without regard to the fact that there was a descriptive
6 term on the end of the mark, either BBQ or Grill.

7 So let's go back to Ms. Dineen's testimony. Quote,
8 to the best of my knowledge the team was made aware that
9 Variety had registered the mark Backyard only. So the best
10 of my knowledge, I think that's all we were made aware of.
11 That's two "best of my knowledges" and one "I think" in one
12 sentence.

13 Ms. Dineen further hedged her testimony in 2014
14 when she said her team had not visited Roses but, quote, it's
15 possible on a local level that there were Walmart associates
16 from our stores that would shop the stores in these local
17 areas. That would be the perfect way for information about
18 Roses' sales of grills and accessories to get back to the
19 home office. The third party that Walmart says was the
20 reason they changed from Backyard Barbecue Grill -- to
21 Backyard Barbecue Grill simply doesn't exist. They refuse to
22 name it and Mr. Blackburn could not find it.

23 When Walmart filed its trademark application to
24 register Backyard Grill, it stated that it was not aware of
25 any conflicting marks. It said it was not aware of any marks

1 either in the identical form thereof or in such near
2 resemblance thereto as to cause confusion, mistake
3 or deception. That statement was untrue.

4 We see here that unlike what Mr. Puzella says, the
5 marks don't have to be identical. Remember, it's the fact
6 that you never see these products side by side. So someone
7 being in a Roses, for example, and seeing this box and then
8 maybe going to a Walmart, what, three or four days later,
9 maybe a week later, and they see this box sitting on the
10 floor, would you necessarily expect to -- a week or two later
11 to have all these differences that Mr. Puzella points out in
12 mind? No. What's the thing you're probably going to
13 remember first? Backyard. And so you think, hmm, I saw a
14 Backyard grill at Roses a week or two ago. Yeah, that's
15 probably the same grill. I'm here in Walmart, so I'll just
16 buy it. That type of confusion is never going to surface.
17 No one is ever going to know that customer made a purchase
18 thinking that it was the same grill at Roses but instead
19 bought it at Walmart. It wasn't the same grill.

20 Walmart never expected to be in this situation six
21 years later which it's in. So when it decided that the
22 Backyard Barbecue mark was -- it was going to have to give it
23 up, Walmart did not kill its own trademark application by
24 identifying Variety's actual usage of the Backyard Barbecue
25 trademark, which they had an obligation to do. Remember,

1 common law uses or public uses are not searchable in the
2 Trademark Office. They rely on applicants to furnish that
3 information.

4 When Variety first opposed Walmart's trademark
5 application, Walmart then realized that it had to have some
6 reason other than its knowledge of Variety's own Backyard
7 Barbecue trademark uses to justify its use of Backyard Grill.
8 So that's where this third-party use of Backyard Barbecue
9 that no one has ever been able to uncover came from.

10 Those facts are the only facts that make sense in
11 this case. And it shows that Walmart is a company that will
12 do whatever it has to do to have its own way. The arrogance
13 of a company that thinks it's too big to have to follow the
14 same rules that everybody else follows. This is willful,
15 intentional, deliberate infringement of the same sort. They
16 knew what Roses, what Variety's trademark rights were, and in
17 full knowledge of those rights decided, well, we would like
18 to have those rights and we're out of time, we've got orders
19 to place. You know, we've lost the Grill Master project.
20 We're just going to have to go ahead and face the
21 consequences later.

22 Now, that's my take on the facts. You may
23 disagree. But it doesn't really matter, because you can come
24 to the same conclusion that I have come to in a different
25 way. And you heard me ask Ms. Dineen about what's called

1 willful blindness. Willful blindness is when you take steps
2 not to investigate a series of facts because of what you're
3 afraid you might find. And if you don't accept the premise
4 that Walmart sort of created this fictitious Barbecue --
5 Backyard Barbecue mark, it's certainly the case that Walmart
6 knew about Roses and knew about Variety, they knew about the
7 trademark application, they knew about the registration, they
8 knew that virtually every Roses store was within a mile or
9 two of Walmart. They went to Lowe's, went to Target and all
10 these other places. They say they never went to a Roses.
11 You make up your own mind about that.

12 Now the issues. First of all, you are not going to
13 be asked to award Variety any money and you've heard no
14 testimony on that issue. Your job is to determine the facts
15 about whether or not Walmart infringed on the Backyard
16 trademark owned by Variety and whether that infringement was
17 willful. And I submit to you that the facts compel an answer
18 of yes to both issues. Walmart asks you, as I do, to use
19 your common sense. If you do, I'm confident you will find in
20 Variety's favor. Thank you so much for your time and
21 attention these past three days.

22 **JURY CHARGE**

23 (By the Court)

24 Ladies and gentlemen, you've heard all the evidence
25 in the case as well as the final arguments by the lawyers.

1 It's my duty to instruct you on the rules of law. You have
2 to follow the law in arriving at your decision.

3 In any jury trial there are, in effect, two judges.
4 I'm one of the judges, you as the jury is the other judge.
5 My duty is to preside over the trial and to make rulings on
6 evidence. It's also my duty at the end of the trial to give
7 you instructions on the law. You're the judge of the facts.
8 In determining what actually happened in the case, in
9 reaching your decision as to the facts, it's your sworn duty
10 to follow the law as the Court instructs you on it.

11 You must follow the instructions. You have no
12 right to disregard or to give special attention to any
13 instruction, nor can you substitute your own opinion of what
14 the law is or ought to be.

15 It's your duty to base your verdict solely upon the
16 testimony and the evidence in the case without any prejudice
17 or sympathy. That's the promise that you made and the oath
18 that you took before you were accepted as a juror. It's your
19 duty to determine the facts, and in so doing you may consider
20 only the evidence that was admitted in the case.

21 The term "evidence" includes the sworn testimony of
22 witnesses and any exhibits that are received into the record.
23 You'll recall that the statements, objections and arguments
24 made by the lawyers are not evidence in the case. The
25 lawyers have an important duty to point out those things that

1 are most helpful or significant to their position in the case
2 and to call your attention to certain facts or inferences
3 that might otherwise escape your notice. In the final
4 analysis, it's your own recollection and your interpretation
5 of the evidence that will control. What the lawyers say is
6 not binding on you.

7 Also during the course of the trial, if I made
8 rulings or asked any questions, you're not to interpret from
9 that that I have any position as to the outcome of the case.
10 I simply do not.

11 While you should consider only the evidence in the
12 case, you are permitted to draw such reasonable inferences
13 from the testimony and the exhibits that you feel are
14 justified in the light of your common experience. You may
15 make such deductions and reach such conclusions that your
16 reason and your common sense lead you to draw from the facts
17 which have been established by the testimony and the evidence
18 in the case.

19 You may consider both the direct and circumstantial
20 evidence. Direct evidence is the testimony of one who
21 asserts an actual knowledge about a fact such as an
22 eyewitness. Circumstantial evidence is proof of a chain of
23 facts and circumstances which support or oppose one side in
24 the case.

25 You don't have to believe all of the evidence that

1 has been accepted in the case or determine that all the
2 evidence is true or is accurate. You're the sole judge of
3 the credibility or believability of each witness and the
4 weight or importance you want to place on that witness's
5 testimony. In weighing the testimony of a witness you may
6 consider that person's relationship to one side or the other
7 in the case; the interest, if any, that the witness has in
8 the outcome of the case; a witness's manner of testifying;
9 the witness's opportunity to observe and acquire knowledge
10 about the facts that the witness testifies to; the witness's
11 candor, fairness and intelligence; and the extent to which
12 what the witness says has been either supported by or
13 contradicted by other credible evidence in the case. You can
14 accept or reject the testimony of any witness in whole or in
15 part.

16 The weight of the evidence is not necessarily
17 determined by the number of the witnesses who testify as to
18 the existence or nonexistence of some fact. You may find
19 that the testimony of a smaller number of witnesses as to
20 some fact is more credible than the testimony of a larger
21 number or vice-versa.

22 A witness who testifies can be impeached by
23 contradictory evidence or by showing that the witness has
24 testified incorrectly about an important matter or by
25 evidence that at some other time the witness has said or done

1 something or has failed to say or do something which is
2 inconsistent with the witness's present testimony. Your
3 recollection controls.

4 The Rules of Evidence provide that if scientific,
5 technical or other specialized knowledge might assist you
6 in -- I'm sorry, I'm having a hard time (coughing) -- in
7 understanding the evidence or in determining a fact at issue,
8 a witness qualified as an expert by that person's knowledge,
9 skill or experience, training or education may testify and
10 may state that person's opinion concerning such matters. You
11 should consider the opinion of each expert received in
12 evidence in the case and give it such weight as you think it
13 deserves. If you decide that the opinion of an expert
14 witness is not based on sufficient education or experience,
15 or if you conclude that the reasons given in support of the
16 opinion are not sound, or that the opinion is outweighed by
17 other evidence, then you may disregard the opinion.

18 The term "trademark" includes any word, name,
19 symbol, or any other combination thereof adopted by or used
20 by a merchant to identify and distinguish its goods from
21 those sold by others and to indicate the source of the goods
22 even if that source is unknown. The owner of a trademark has
23 the right to exclude others from using that trademark or a
24 similar trademark that is likely to cause confusion in the
25 marketplace. The main function of a trademark is to identify

1 and distinguish goods such as a product of a particular
2 manufacturer or merchant and to protect its goodwill against
3 the sale of another's product as its own.

4 In this case, the first issue is whether the
5 plaintiff established by a preponderance of the evidence that
6 the defendant infringed on the plaintiff's valid trademark.
7 The burden of proof on this issue is on the plaintiff. The
8 plaintiff has to establish the infringement by a
9 preponderance of the evidence that the evidence when you
10 consider it is more likely true than not true.

11 The law entitles a trademark owner to exclude
12 others from using that trademark.

13 The United States Patent and Trademark Office
14 granted Variety an incontestable trademark registration for
15 quote, The Backyard, end quote, for retail store services in
16 the field of lawn and garden equipment and supplies. An
17 incontestable registered trademark is deemed sacred and its
18 validity cannot be challenged. You must consider Variety's
19 incontestable trademark conclusive evidence of Variety's
20 ownership of the trademark and that the trademark is valid
21 and protectable.

22 As to the likelihood of confusion as to Walmart's
23 use of Backyard, you must consider whether Walmart's use of
24 Backyard is likely to cause confusion about the source,
25 endorsement, affiliation or sponsorship of Variety or

1 Walmart's products.

2 An intent to confuse customers is not required for
3 a finding of trademark infringement. Forward confusion would
4 occur when consumers who encounter Walmart's use of Backyard
5 believe that the goods and services of Walmart originate
6 and/or are connected with Variety's Backyard trademarks.

7 Reverse confusion would occur if Walmart's use of
8 Backyard has generated so much advertising promotion and
9 exposure to the marketplace that consumers are likely to
10 mistakenly believe that Walmart is the owner of the Backyard
11 trademarks and not Variety, who's the true owner.

12 As you consider the likelihood of confusion, you
13 should examine the following factors and give such weight to
14 them as you believe the evidence has established by the
15 trial:

16 First, the strength or distinctiveness of Variety's
17 trademark; second, the similarity of Variety's trademark and
18 Walmart's use of Backyard; third, the similarity of the goods
19 that the respective trademarks identify; fourth, the
20 similarity of the facilities Variety and Walmart use in their
21 business; fifth, the similarity of the advertising used by
22 Variety and Walmart to market and promote their goods bearing
23 Backyard; sixth, Walmart's intent in selecting the word
24 "Backyard" as part of its trademark; seventh, actual
25 confusion between Variety and Walmart's products or

1 trademarks; eighth, the quality of the parties' products to
2 which the markets are applied; and finally, the
3 sophistication of the consumers who purchased the parties'
4 products.

5 The Court has found as a matter of law that the
6 plaintiff's marks, The Backyard, Backyard, and Backyard
7 Barbecue are all protected. The only question is whether the
8 defendant's use of Backyard Grill and Design was likely to
9 cause confusion in connection with plaintiff's marks. If you
10 find defendant's use of Backyard Grill + Design mark was
11 likely to cause confusion, you must find for the plaintiff.
12 If you find that the use was not likely to cause confusion,
13 you must find for the defendant.

14 The verdict form that you will receive says: Has
15 the plaintiff Variety proved by a preponderance of the
16 evidence that defendant Walmart's use of Backyard Grill +
17 Design mark was likely to cause confusion in connection with
18 plaintiff Variety's The Backyard, Backyard and Backyard
19 Barbecue marks and was it therefore infringing, and you
20 answer that either yes or no.

21 If you answer it no, then that ends the case. If
22 you answer it yes, then go to the second question, which
23 says: If you answered yes to question one, do you find that
24 defendant Walmart's infringement was willful. And you can
25 answer that either yes or no. When you finish doing that,

1 you will have ended the case and you will return to your --
2 to the courtroom for your verdict.

3 When you retire to your jury room, select one of
4 your number to be your foreperson. That can be anyone among
5 you. That person will preside over your deliberations. Each
6 of you must decide the case for yourself. You're to do so
7 with consideration and respect for the opinion of your fellow
8 jurors. You're not required to surrender your honest
9 conviction and belief about the evidence or its effect in
10 order to reach a verdict. Each of you is a judge of the
11 facts. You have to be unanimous in reaching a verdict.

12 All right. I'll see the lawyers up here.

13 **BENCH CONFERENCE**

14 (On the Record)

15 THE COURT: Go ahead and make your objections.
16 Plaintiff have objections to the charge?

17 MR. ADAMS: No, your Honor.

18 THE COURT: Do you have objections to the charge?

19 MR. HOSP: Yes, your Honor. Just a moment. We
20 object to the instructions' use of Backyard referring --
21 alone referring to Walmart and -- hold on. (Perusing
22 documents). We object to the lack of an instruction on
23 conceptual weak marks.

24 One last one -- that's it. Thank you.

25 THE COURT: Okay. Overruled. You can go back.

1 I'll excuse the jury.

2 (Conclusion of Bench Conference)

3 (Open Court)

4 THE COURT: For your convenience we ordered you
5 lunch. It will be delivered -- I think it's maybe here
6 now --

7 THE CLERK: Yes --

8 THE COURT: -- to the jury room and you can have
9 your lunch and begin your deliberations at your convenience.
10 So we'll be in recess awaiting a verdict.

11 (Jury excused to deliberate at 12:15 p.m.)

12 (Recess at 12:15 p.m. to 1:28 p.m.)

13 (Open Court)

14 THE COURT: Take the note from him and give it to
15 me.

16 You can have a seat. All I can do is tell them to
17 recall the evidence that --

18 (Jury in at 1:28 p.m.)

19 THE COURT: Ladies and gentlemen, I have your
20 questions. Unfortunately, the way a trial works is you've
21 heard the evidence and that's the end of it. There's no -- I
22 can't come back and add things to it or take things away from
23 it and you just have to do the best you can. There are eight
24 of you. One or more have paid attention or picked up on
25 every single thing that's happened over the past two days, so

1 share your impressions with each other. But the evidence is
2 finished. And the law is to you now and the verdict is to
3 you, and you have a burden of proof that the party with the
4 burden of proof has to satisfy and that's all I can tell you.
5 I can't add things to what's happened in the trial. Is that
6 okay?

7 (All jurors respond affirmatively)

8 THE COURT: Okay. I'll let you go back.

9 (Jury out at 1:29 p.m.)

10 THE COURT: Okay. Thank you. We'll be at ease.

11 (Informal recess at 1:30 p.m. to 1:54 p.m.)

12 (Verdict by the jury at 1:51 p.m.)

13 (Jury in at 1:54 p.m.)

14 THE COURT: Who is the foreperson of the jury? You
15 are? If you'll give the marshal the verdict, please.

16 (The Marshal handing verdict form to the clerk. The Deputy
17 Clerk handing the jury verdict form to the Court)

18 THE COURT: Okay. The jury's decision is: Has the
19 plaintiff Variety proved by a preponderance of the evidence
20 that the defendant Walmart's use of Backyard Grill was likely
21 to cause confusion with plaintiff Variety's Backyard marks?
22 And the answer is yes.

23 The second question is: If you answered yes, do
24 you find that Walmart infringement was willful? And the
25 answer is yes.

1 All right. Thank you, ladies and gentlemen. Thank
2 you for your service. I hope that you found it satisfactory
3 and I'll excuse you now.

4 (Jury out at 1:57 p.m.)

5 THE COURT: You can have a seat. I'll give you
6 whatever the time is under the rules to file motions and to
7 decide how you want to proceed from now on, whether you want
8 to appeal it and find that it's an appealable order and take
9 it to the Fourth Circuit again and see what they say or
10 whether you don't want to appeal it, in which case I would
11 seek to reconvene this same group of people on the damage
12 issue, but that doesn't need to be decided right now. That
13 can be decided as time goes by.

14 So thank you for your participation. We'll be in
15 recess.

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18 (Hearing concluding at 1:58 p.m.)
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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NORTH CAROLINA
3

4 CERTIFICATE OF OFFICIAL REPORTER
5

6 I, Michelle A. McGirr, RPR, CRR, CRC, Federal
7 Official Court Reporter, in and for the United States
8 District Court for the Eastern District of North Carolina, do
9 hereby certify that pursuant to Section 753, Title 28, United
10 States Code, that the foregoing is a true and accurate
11 transcript of my stenographically reported proceedings held
12 in the above-entitled matter and that the transcript page
13 format is in conformance with the regulations of the Judicial
14 Conference of the United States.
15

16 Dated this 15th day of November, 2018
17

18 /s/ Michelle A. McGirr
19 MICHELLE A. MCGIRR
20 RPR, CRR, CRC
21 U.S. Official Court Reporter
22
23
24
25